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COURT OF APPEALS  
DIVISION II

05 MAY 10 AM 11:33

STATE OF WASHINGTON

BY [Signature]  
DEPUTY

80091-0

NO. 33647-2-II

Clark County No. 05-1-01064-8

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JESUS DAVID BUELNA-VALDEZ**

**Appellant.**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW NUMBER 5 ON THE CrR 3.6 HEARING.**
- 2. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW NUMBER 6 ON THE CrR 3.6 HEARING.**
- 3. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW NUMBER 7 ON THE CrR 3.6 HEARING.**
- 4. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW NUMBER 8 ON THE CrR 3.6 HEARING.**
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**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. THE SEARCH INCIDENT TO ARREST CONDUCTED BY DEPUTY ELLITHORPE WAS UNREASONABLE BECAUSE IT WAS NOT CONTEMPORANEOUS WITH THE ARREST.**
- 2. THE SEARCH INCIDENT TO ARREST CONDUCTED BY DEPUTY ELLITHORPE WAS UNREASONABLE BECAUSE IT EXCEEDED THE SCOPE OF A LAWFUL SEARCH INCIDENT TO ARREST.**

**C. STATEMENT OF THE CASE**

On May 10<sup>th</sup>, 2005 at approximately 7:45 p.m. Appellant David Jesus Buelna-Valdez was stopped by Clark County Sheriff's Detective Tom Dennison while driving a Chevrolet Lumina minivan because one of

his headlights was not illuminated. CP 38 (Finding of Fact #1). Detective Dennison discovered that there was an outstanding felony warrant for Mr. Buelna-Valdez's arrest. CP 39 (Finding of Fact #3). Deputy Boyle arrived to assist Detective Dennison at 7:53 p.m. CP 39 (Finding of Fact #4). Detective Dennison then arrested Mr. Buelna-Valdez on the warrant and placed him in the rear seat of his patrol car. CP 39 (Finding of Fact #4). The trial court's findings of fact on the CrR 3.6 hearing are silent as to how many minutes passed between the stop of the vehicle and Mr. Buelna-Valdez's arrest, but Deputy Boyle guessed that between five and ten minutes passed. RP 9 (7-15-05). Detective Dennison then began to search the interior of the van while Deputy Boyle watched from outside the vehicle. CP 39 (Finding of Fact #5), RP 10 (7-15-05). Deputy Boyle was watching the passenger, co-Appellant Reyes Ruiz, for officer safety reasons while Detective Dennison searched the van. RP 10 (7-15-05).

During Detective Dennison's search of the van he noticed that an interior panel under the dash board was loose, as well as some of the door panels, and that the screws that would hold them in place were missing. RP 11 (7-15-05). The officers noticed that the panels were held in place with plastic, pushpin-type temporary screws that are typically used in automobile and boating applications. RP 11 (7-15-05). At that point, Detective Dennison announced that he felt something wasn't right, and

Deputy Boyle suggested they call Deputy Ellithorpe and his narcotics dog, Eiko. RP 11 (7-15-06).

Deputy Ellithorpe and Eiko arrived at 8:20 p.m. CP 39 (Finding of Fact #5). When Deputy Ellithorpe arrived, he observed that Mr. Buelna-Valdez was secured in a patrol car. Id. First, Deputy Ellithorpe led Eiko on an external sweep of the vehicle. CP 40 (Finding of Fact #6). Eiko did not alert on the exterior of the van, nor did he alert on the dashboard or door panel areas of the minivan. RP 19-20 (7-15-06). The van had two rows of seats behind the driver and front passenger seats. CP 40 (Finding of Fact #7). Eiko alerted on a vent on the interior body panel on the driver's side of the van, near the second row of seats. CP 40, (Finding of Fact #7). Deputy Ellithorpe then removed Eiko from the van and began examining the panels in the area near the vent. CP 40 (Finding of Fact #7).

Deputy Ellithorpe found the vents to be secure, so he continued searching until he found a molded plastic cup holder which was loose toward the rear of the van. CP 40 (Finding of Fact #8). Deputy Ellithorpe then lifted the cup holder out of its foundation and observed a piece of insulation underneath where the cup holder had been. CP 40 (Finding of Fact #8). Ellithorpe then removed the insulation and saw two packages wrapped in plastic, lying in the space underneath the panel. Id. The

contents of these packages later proved to be methamphetamine. CP 52 (Finding of Fact on Non-Jury Trial #10).

On May 13<sup>th</sup>, 2005 Mr. Buelna-Valdez was charged with Possession of a Controlled Substance (Methamphetamine) with Intent to Deliver within 1,000 feet of a school bus stop. CP 1. An Amended Information with the same charges was filed on July 19<sup>th</sup>, 2005. CP 35. On July 5<sup>th</sup>, 2005 counsel for Mr. Buelna-Valdez filed a motion to suppress the methamphetamine found in the van, and a hearing on the motion was heard by the Honorable John Nichols on July 15<sup>th</sup>, 2005. CP 18, Report of Proceedings (7-15-05). The motion was denied. CP 44 (Conclusion of Law #9). The trial court entered the following findings of fact to which Mr. Buelna-Valdez assigns error in this appeal:

C.L. #5: Pursuant to State v. Stroud, 106 Wn.2d 144, State v. Vrieling, 144 Wn.2d 489, and State v. Johnson, 128 Wn.2d 431, Detective Dennison, as assisted by Deputy Ellithorpe, was lawfully permitted to conduct a warrantless search of the passenger compartment of the vehicle driven by Defendant Valdez, as a search incident to the Defendant's arrest.

C.L. #6: The passenger compartment includes all space reachable without exiting the vehicle, and any unlocked containers therein. The search of the entire area to the rear of the front seats, including the area



near the loose cup holder, was therefore properly within the scope of the warrantless search of the Defendant's vehicle incident to his arrest.

C.L. #7: Because the cup holder was unsecured and could be lifted easily and without force to expose the space underneath without breaking or removing any screw, lock or fastener, the space under the cup holder was the equivalent of an unlocked glove box, console or other unlocked space within the passenger compartment and was thus also within the scope of the search of the vehicle incident to Defendant's arrest. State v. Boursaw, 94 Wn.App. 629, State v. Vrieling, supra; State v. Johnson, supra.

C.L. #8: Detective Dennison was entitled to obtain the assistance of Deputy Boyle and Deputy Ellithorpe and narcotics dog Eiko in conducting the search of the vehicle incident to the arrest. State v. Boursaw, supra.

C.L. #9: The methamphetamine was therefore seized as the product of a lawful warrantless search of the vehicle incident to arrest of the driver, Defendant Valdez, and the Motion to Suppress should therefore be denied.

C.P. 43-44.

A non-jury trial on stipulated facts was held on July 18<sup>th</sup>, 2005 before the Honorable John Nichols, and Mr. Buelna-Valdez was found

guilty. CP 53. Mr. Buelna-Valdez's standard range, including the 24 month school zone enhancement, was determined to be 36 to 44 months. CP 61. Mr. Buelna-Valdez was sentenced to 42 months' confinement, as well as a 9 to 12 month term of community custody, which exceeded the top of the standard sentencing range. CP 63, 64. The trial court apparently did not intend to impose an exceptional sentence as the "Exceptional Sentence" paragraph (paragraph 2.4) on the Judgment and Sentence was left unchecked and no findings of fact and conclusions of law in support of an exceptional sentence were entered as required. CP 61. This timely appeal followed. CP 74.

#### **D. ARGUMENT**

##### **1. THE SEARCH INCIDENT TO ARREST CONDUCTED BY DEPUTY ELLITHORPE WAS UNREASONABLE BECAUSE IT EXCEEDED THE SCOPE OF A LAWFUL SEARCH INCIDENT TO ARREST.**

Warrantless searches are per se unreasonable unless they fall within a narrow class of established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). A search incident to a valid arrest is a well recognized exception to the warrant requirement. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969); *United States v. Vasey*, 834 F.2d 782 (1987); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436

(1986). In *Chimel*, the United States Supreme Court ruled that incident to a lawful arrest, officers may search the area of the arrestee's wingspan, meaning the area into which a suspect might reach a weapon or evidence. *Chimel* at 762-63; *Vasey* at 787. In *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860 (1981), the United States Supreme Court, based on the rather unfair assumption that officers in the field lacked the ability to make very simple determinations about what areas are within an arrestee's reach and which areas are not, established a rule that when officers search an automobile incident to arrest, they may search the entire passenger compartment of the automobile and any containers found within the passenger compartment, without regard to an arrestee's *actual* ability to reach the areas or items searched.

In *State v. Stroud*, 106 Wn.2d 144, 151, 720 P.2d 436 (1986), the Washington State Supreme Court, applying Article 1, Section 7 of the Washington State Constitution held that officers in this state may search the entire passenger compartment of a vehicle incident to the lawful arrest of an occupant of that vehicle. Although the rationale behind this rule is that an arrestee may reach for a weapon, thereby putting an officer at risk, or reach evidence that he may destroy, thereby justifying the search, this rationale is a legal fiction because the search may occur even if the arrested subject is already secured and in the custody of the police. The

*Stroud* court, like the *Belton* court, reasoned that officers in the field were incapable of identifying obvious exigencies and determined that a bright line rule was required, even though it came at the expense of individual rights. *Stroud* at 151. The *Stroud* court departed from the *Belton* court, however, by ruling that only the passenger compartment and unlocked containers may be searched, as opposed to locked containers. *Stroud* at 151-52.

As Division II of the Court of Appeals noted in *State v. Johnston*, 107 Wn.App. 280, 285, 28 P.2d 775 (2001), *reviewed denied*, 145 Wn.2d 1021, 41 P.3d 483 (2002), the *Stroud* rule is not without limitation. The *Johnston* court stated:

...[T]he key question when applying *Belton* and *Stroud* is whether the arrestee had *ready* access to the passenger compartment at the time of the arrest. If he could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest. If he could not do that, the police may not search the compartment incident to his arrest. Sometimes, this is referred to as having “immediate control” of the compartment.

*Johnston* at 285-86. In this case, the methamphetamine was found in a void between the exterior sheet metal and the interior trim panel of the minivan. While this area might be accessible from the passenger area without leaving the vehicle, this area is not a “container” as that term is defined in *Belton*. (*Belton* court defined “container” to mean “any object

capable of holding another object.” *Belton* at 460, n. 4). Nor is it an area, such as a trunk or engine compartment, which would require an occupant of the vehicle to leave the vehicle in order to access it.

The area in which the drugs were found, however, was not readily accessible by either Mr. Buelna-Valdez or Mr. Ruiz at the time Mr. Buelna-Valdez was arrested. It would have been impossible, once Detective Dennison stopped this van, for either Mr. Buelna-Valdez or Mr. Ruiz to have reached this void and destroyed this evidence. The passenger compartment certainly cannot be said to include areas which require dismantling of the interior of the vehicle in order to be reached. When the court in *Stroud* excluded locked containers from the permissible items which can be searched incident to arrest, it gave the following rationale:

First, by locking the container, the individual has shown that he or she reasonably expects the contents to remain private...Secondly, the danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container.

*Stroud* at 152. Although the void in which the methamphetamine was found cannot technically be considered a locked container, it is certainly analogous in character and spirit.

Applying the *Stroud* rationale to the area in which the methamphetamine was found in this case, it is clear that Mr. Buelna-

Valdez expressed a reasonable expectation that this item would remain private. The item was secreted in between the interior panels of the van and the exterior sheet metal of the van, and could not be reached without a certain level of dismantling by Deputy Ellithorpe. Second, the danger that either Mr. Buelna-Valdez or Mr. Ruiz could have reached this area of the van and successfully retrieved this item in spite of, in the case of Mr. Buelna-Valdez, being handcuffed and seated in the back of a patrol car, and in the case of Mr. Ruiz, being detained by Deputy Boyle outside the vehicle, was non-existent. The search conducted by Deputy Ellithorpe clearly exceeded the scope of a lawful search incident to arrest and the court erred in denying Mr. Buelna-Valdez's motion to suppress.

In *State v. Boursaw*, 94 Wn.App. 629, 635, 976 P.2d 130 (1999), Division I of the Court of Appeals held that the officers' removal of the dashboard ashtray that was in the area immediately reachable by the driver and the front passenger was proper because it was within reach of the occupants of the automobile. This case is distinguishable from *Boursaw* in that the area searched in Mr. Buelna-Valdez's van was not reachable in any way by the occupants of the van, unlike the dashboard ashtray in the *Boursaw* case. The *Boursaw* court was careful to state that its holding was limited to the facts of the case before it. *Boursaw* at 635. Further,

Division I's opinion in *Boursaw* is not binding authority on this Court, but merely persuasive authority.

**2. THE SEARCH INCIDENT TO ARREST CONDUCTED BY DEPUTY ELLITHORPE WAS UNREASONABLE BECAUSE IT WAS NOT CONTEMPORANEOUS WITH THE ARREST.**

Although the *Stroud* court attempted to establish a “bright-line” rule regarding searches of an automobile incident to arrest that would eliminate the need for case-by-case analysis, such an attempt in the area of search and seizure has proven time and again to be futile. This is so because even when it is obvious that an officer has not exceeded the proper physical scope of the search incident to arrest, the search must have been contemporaneous with the arrest and not simply “following” the arrest. Here, the search was not contemporaneous with the arrest. The search conducted by Deputy Ellithorpe was not part of the initial search incident to arrest conducted by Detective Dennison to secure the van and find any reachable weapons and evidence. The search by Deputy Ellithorpe was a second, warrantless search which was conducted, based upon the imprecise guess of Deputy Boyle, anywhere from seventeen to twenty-three minutes after Mr. Buelna-Valdez was arrested and secured in the back of a patrol car. That assumes, of course, that the second search began at exactly 8:20 p.m., the time he arrived on the scene. It is more

likely, however, that the search occurred much later than 8:20 because after arriving at the scene, Deputy Ellithorpe had to be briefed on the situation by the other officers and led Eiko on an exterior search of the vehicle. As such, it is extremely unlikely that the second search began only seventeen minutes after Mr. Buelna-Valdez's arrest, but more likely that it occurred at least twenty-eight to thirty minutes after Mr. Buelna-Valdez's arrest. Such a search cannot be considered "contemporaneous" with the arrest.

In *United States v. Vasey*, 834 F.2d at 782, 786 (1987), the Ninth Circuit reversed the conviction where the search of the Defendant's vehicle occurred thirty to forty-five minutes after the Defendant's arrest. The court noted that in *Belton*, the Supreme Court explicitly held that a search incident to arrest must be conducted contemporaneously with the arrest. The Ninth Circuit, in reversing Mr. Vasey's conviction noted that during the thirty to forty-five minute period that elapsed between the arrest and the search, Mr. Vasey was handcuffed and in the back of a patrol car, and that the officers had several conversations with the Defendant during that time. The court noted that during this time, "...the *Belton* Court's fear of forcing officers to make split second legal decisions during the course of an arrest evaporated and took with it the right of the officers to enter the vehicle during or immediately after the arrest..." *Vasey* at 787. The *Vasey*



court noted that the government was seeking a rule which would expand the search incident to arrest rule into a search *following* arrest, rather than incident to (i.e. contemporaneous with) arrest. *Vasey* at 788. This, the Court held, was not consistent with the Supreme Court's holding in *Belton*. *Id.*

“At some point, a significant delay between the arrest and the search renders the search unreasonable because it is no longer contemporaneous with the arrest.” *Boursaw* at 632, *Smith* at 683, *United States v. Chadwick*, 433 U.S. 1, 15-16, 97 S.Ct. 2476 (1977). In *Boursaw* the court noted that the delay of ten minutes in that case was not unreasonable, and that the holding was specifically limited to the facts of that case. *Boursaw* at 635. In *Smith*, the seventeen minute delay was not unreasonable where the delay was not caused by “unnecessarily time-consuming activities unrelated to the securing of the suspect and the scene” and the officer's activities during the delay were all incident to the arrest. *Smith* at 684.

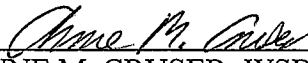
In this case, Mr. Buelna-Valdez had been handcuffed and placed in the back of a patrol car, while his passenger was being detained some 15-20 feet away from the van by Deputy Boyle. The scene was secure and there was no opportunity for either defendant to reach evidence or a weapon inside the van. The van had already been searched by Detective

Dennison, but he decided to call Deputy Ellithorpe because he wanted the drug dog to conduct a more intrusive search and he didn't want to go through the effort and hassle of obtaining a search warrant. This second, more intrusive search was totally unrelated to officer safety or to seizing evidence that was out in the open and in danger of destruction. The sole purpose of this second search was to search for drugs that were not contained in the passenger compartment of the vehicle (but which Detective Dennison suspected to exist nonetheless), while circumventing the warrant requirement. The trial court erred in denying the motion to suppress.

**E. CONCLUSION**

Mr. Buelna-Valdez's conviction should be reversed and dismissed.


RESPECTFULLY SUBMITTED THIS 8<sup>th</sup> day of May.

  
\_\_\_\_\_  
ANNE M. CRUSER, WSB# 27944  
Attorney for Mr. Buelna-Valdez

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Appellant.

) Court of Appeals No. 33647-2-II  
) Clark County No. 05-1-01064-8  
) AFFIDAVIT OF MAILING  
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ANNE M. CRUSER, being sworn on oath, states that on the 8<sup>th</sup> day of May 2006, affiant placed a properly stamped envelope in the mails of the United States, addressed to:

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AND

Mr. David Jesus Buelna-Valdez  
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Anne M. Cruser

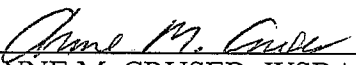
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2  
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6 and that said envelope contained the following

- 7 (1) APPELLANT'S OPENING BRIEF  
8 (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. CURTIS)  
9 (3) R.A.P. 10.10 (TO MR. BUELNA-VALDEZ)  
10 (4) AFFIDAVIT OF MAILING

11  
12 Dated this 8<sup>TH</sup> day of May 2006,

13   
14 ANNE M. CRUSER, WSBA #27944  
15 Attorney for Appellant

16 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of  
17 Washington that the foregoing is true and correct.

18 Date and Place: May 8<sup>th</sup>, 2006, Kalama, Washington

19  
20 Signature: Anne M. Cruser  
21  
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23  
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25